

TERMS AND CONDITIONS OF TRADE

*The following Terms and Conditions of Trade apply to all transactions between
Atkar Group Pty Ltd (ACN 139 138 720) (ABN 89 139 138 720) trading as Atkar (**Atkar**) and its Customers*

1. **Payments to be** by cash, cheque, bank cheque or EFTPOS and without deduction unless otherwise agreed.
2. **Interest will be charged** on overdue accounts at the rate prescribed under the *Penalty Interest Rates Act 1983* (Vic) plus 2% which shall be charged from the due date until payment has been made in full.
3. **Property:** Even if Atkar grants any credit facility and/or time to pay:
 - (a) title to and property in all Products sold by Atkar to the Customer shall not pass to the Customer until payment has been made to Atkar in full of all monies owed to Atkar under this or any other agreement;
 - (b) notwithstanding clause 3(a), the risk of loss or damage to the Products shall pass to the Customer from the time of delivery to the Customer or its agent and the Customer shall keep the Products properly insured for their insurable value until all monies whatsoever owing by the Customer to Atkar have been paid in full. All policies of insurance shall be effected in the joint names of the Customer and Atkar for their respective rights in respect of loss or damage to the Products and the policies of insurance shall apply equally to Atkar and to the Customer as if each were separately insured under any such policy of insurance;
 - (c) the Customer shall hold all Products supplied to the Customer delivered to it or to its agents as fiduciary agent or bailee for Atkar;
 - (d) the Customer shall ensure that all Products supplied to the Customer by Atkar are stored separately from all other goods which may be in the Customer's possession, and that all Products supplied to the Customer by Atkar under this or any other agreement are clearly labelled as belonging to Atkar;
 - (e) the Customer will not cause the Products to lose their identifiable character or be intermingled with other goods, in any way, either by any process of its own or by a third party, except with Atkar's prior written consent;
 - (f) the Customer will not create any absolute indefeasible interest in the Products in relation to any third party, except with Atkar's prior written consent;
 - (g) pending payment in full for all amounts owed by the Customer to Atkar on all accounts, the Customer:
 - (i) must not allow any person to have or acquire any Security Interest in the Products; and
 - (ii) must not remove, deface or obliterate any identifying mark or number on any of the Products,
 - (h) until all monies owing to Atkar by the Customer have been paid in full for all Products supplied to the Customer under this or any other agreement and until the Customer has satisfied any other debts owing to Atkar, Atkar authorises the Customer to sell the Products to a third party as a fiduciary agent of the Atkar. The Customer shall, however, not represent to any third party that it is in any way acting for the Company and the Company will not be bound by any contract with third parties made by the Customer.
 - (i) The Customer agrees that a Certificate signed by an officer or employee of Atkar identifying Products as those of Atkar shall be conclusive evidence of Atkar's title to such Products;
 - (j) upon sale or disposition of any Products prior to payment in full being made the Customer agrees to:
 - (i) deposit all proceeds of such sale in a separate bank account;
 - (ii) not mix such proceeds with any other monies; and
 - (iii) account to Atkar for the same as fiduciary and bailee;
 - (k) without derogating from Atkar's rights as a creditor of the Customer or arising under these Terms, if Products are used in any construction, building, fabrication and/or manufacturing process ["the Process"] which results in an entitlement of the Customer to receive money from any other person the Customer agrees to hold such part of any monies received by the Customer (or the corresponding book debt owed to the Customer in respect of these monies) as is equivalent to the value of any Products used in the Process as invoiced to the Customer by Atkar upon trust for Atkar until payment is made to Atkar in full all monies owed by the Customer to Atkar.
4. **Default:**
 - (a) If the Customer does not pay for any Products delivered to it by the due date for payment, Atkar may take possession and dispose of the Products as it sees fit at any time until full payment has been received for all monies owed to Atkar.
 - (b) The Customer grant Atkar permission to enter any property to recover Products and with such force as is necessary and agrees to pay or reimburse Atkar for its costs of and incidental to taking such action.
 - (c) The Customer indemnifies Atkar from any claims, suits, actions, demands, damages, liability, loss, costs or expenses arising out of or in connection with Atkar's repossession and disposal of the Products in accordance with this clause.
5. **Security:**
 - (a) By ordering the Products from Atkar, the Customer grants a Security Interest to Atkar and enters into a Security Agreement with Atkar in respect of all Products ordered by the Customer and all of the Customer's present and after acquired property whether owned outright or beneficially to secure the payment of money by the Customer and performance of obligations by the Customer under these Terms and Conditions of Trade.
 - (b) The Customer acknowledges and agrees that the Products are inventory.
 - (c) The Customer must, within the timeframe notified by Atkar, sign all documents and do all things necessary, as notified by Atkar to, or as otherwise required to:
 - (i) enable Registration with respect to the Security Interest and for that Registration to continue until such time as all of the Customer's obligations under the Security Agreement have been satisfied, including providing the Customer's details and any serial numbers required for Registration;
 - (ii) if the PPSA applies, enable the Security Interest to be perfected and continue to be perfected until such time as all of the Customer's obligations under the Security Agreement have been satisfied;

- (iii) ensure that the Security Interest has priority over all other security interests in the Personal Property, whether registered, perfected or otherwise and whether created or arising before or after the creation of the Security Interest, except those security interests which Atkar agrees will have priority over the Security Interest or which by law have priority over the Security Interest; (iv) ensure that Atkar is able to enforce the Security Interest until such time as all of the Customer's obligations under the Security Agreement have been satisfied and the Customer must not do anything which affects the enforceability of the Security Interest;
- (v) make any changes to the Registration relating to the Security Interest as Atkar may require from time to time, including to enable correction of any defects in the Registration;
- (vi) if the PPSA applies, ensure that a third person cannot acquire an interest in any Collateral free of Atkar's Security Interest other than, where applicable, as a result of the Customer dealing with inventory in the ordinary course of business;
- (d) Atkar may exercise its rights in relation to the Security Interest any time after the Grantor fails to comply with its obligations under the Security Agreement;
- (e) To the extent permitted by the PPSA, the Customer waives its rights to receive any notices, statements or forms required to be issued or which would ordinarily be issued, whether by Atkar or any other person, to the Customer under the PPSA;
- (f) The Customer must pay to Atkar on request, all Atkar's expenses, including legal costs, stamp duty and registration fees, in connection with the Security Agreement and the grant of the Security Interest, Registration with respect to the Security Interest and release of the Security Interest and, if the PPSA applies, perfection of the Security Interest;
- (g) Where permitted under the PPSA or any other relevant law, the provisions contained in the Security Agreement will prevail over the PPSA or any other relevant law, to the extent of any inconsistency;
- (h) In this clause 5, unless the context otherwise requires:
 - (i) **"Collateral"** means the Personal Property to which the Security Interest is attached and, in relation to Registration with respect to the Security Interest, includes the Personal Property described by the Registration (whether or not the Security Interest is attached to the Personal Property) and all other present and after-acquired rights and interests in land and any other property, rights and interests that is not Personal Property;
 - (ii) **"Enforce"** means exercise all of Atkar's rights, under the Security Agreement or otherwise, in relation to the Security Interest;
 - (iii) **"Enforceability"** means Atkar's ability to exercise all of its rights, under the Security Agreement or otherwise, in relation to the Security Interest;
 - (iv) **"Personal Property"**:
 - A. if the PPSA applies, means all the Customer's present and after-acquired personal property (as defined in the PPSA and to which the PPSA applies) and/or all present and after-acquired personal property (as defined in the PPSA and to which the PPSA applies) in which the Customer has rights and includes all of the Collateral and any other assets, property and rights over which the Security Interest is permitted by law; and
 - B. in all other circumstances, means all assets, property and rights, real or personal of any nature whatsoever owned by the Customer and/or in which the Customer has rights, at present or in the future, and, where applicable, includes:
 - C. the proceeds from the sale of any of the Personal Property; and
 - D. if the PPSA applies, the Grantor's security interest in any Collateral;
 - (v) **"PPSA"** means the *Personal Property Securities Act 2009* (Cth) and the *Personal Property Security Regulations 2010* (Cth) (as amended);
 - (vi) **"Registration"**:
 - A. if the PPSA applies, registration of the Security Interest on the Register; and
 - B. in all other circumstances, means registration of the Security Interest on the relevant register, to enable the Security Interest to have priority in accordance with the Security Agreement;
 - (vii) **"Secured Party"** means Atkar and if the PPSA applies, includes the meaning given to those words in the PPSA;
 - (viii) **"Security Agreement"** means:
 - A. any agreement, arrangement or transaction between the Customer and Atkar that creates or evidences the Security Interest, in the form prepared by Atkar at the cost of the Customer and, where applicable, in accordance with the PPSA; and
 - B. in relation to a Security Interest granted by the Customer to Atkar includes any agreement between Atkar and the Customer which creates or evidences the Security Interest, which may include these Conditions;
 - (ix) **"Security Interest"**:
 - A. if the PPSA applies, means a security interest (as defined in the PPSA); and
 - B. in all other circumstances, means any mortgage, charge, pledge, lien, hypothecation, trust, power, agreement where Atkar retains title in the Personal Property (eg. retention or conditional sales agreement), hire or hire purchase agreement, option, subordination or other security interest, granted the Customer in the Customer's Personal Property to Atkar under the Security Agreement to secure payment of all money by the Grantor and performance of all the Customer's obligations under the Security Agreement and, if the PPSA applies, includes a purchase money security interest; and
 - (x) if the PPSA applies, words and phrases not defined in these Conditions will have the meaning given to them in the PPSA.

6. Limitation of Liability: The Customer agrees:

- (a) that Atkar goods come with guarantees that cannot be excluded under the Australian Consumer Law. Where the Australian Consumer law applies to your purchase, you are entitled to a replacement, supply of an equivalent product or refund for a major failure (at Atkar's sole discretion). You are also entitled to have the goods repaired or replaced (at Atkar's sole discretion) if the goods fail to be of acceptable quality and the failure does not amount to a major failure.
- (b) that Atkar shall not be liable for any loss or expense arising after seven days from delivery (or at all once Products have been unpacked, fixed and/or otherwise used or applied) after which there shall be deemed to have been unqualified acceptance of the Products by the Customer.
- (c) that Atkar shall not be liable for any contingent, consequential, direct, indirect, special or punitive damages whether due to negligence or otherwise and that the Customer acknowledges this limit of liability and agrees to limit any claim; accordingly, and
- (d) that no other term, condition, agreement, representation and/or understanding whether express or implied, in any way extending to or otherwise relating to or binding upon Atkar other than these Terms (and any warranty that is expressly provided in writing by Atkar to the Customer) is made or given by or on behalf of Atkar.

7. Exclusions: The Customer agrees that:

- (a) no dealing between Atkar and the Customer shall be or be deemed to be a sale by sample;
- (b) the Customer shall rely on its own knowledge and expertise in selecting Products for any purpose and any advice or assistance given for or on behalf of Atkar shall be accepted at the Customer's risk and shall not be deemed to have been given as expert or advisor nor to have been relied upon;
- (c) Products are sold subject to each and every manufacturer's trading terms and conditions and are protected by each and every manufacturer's warranty; and
- (d) any advice, whether oral or written, provided by Atkar or any employee or agent shall be limited to the information, specifications and instructions received from the Customer. The Customer confirms that all information and specifications provided to Atkar are current and correct. If, after the provision of advice from Atkar, the Customer changes its requirements, information, specifications or instructions, any advice previously provided by Atkar will no longer be applicable. The Customer confirms that any written advice provided by Atkar shall supersede any oral advice provided by Atkar and acknowledges that the Customer is not relying on any oral advice. The Customer is responsible for seeking the advice of a suitably qualified construction professional in determining the appropriateness of the performance requirements, specifications and Australian Standards for any given application and acknowledges being informed by Atkar of the requirement to seek such advice. The Customer confirms that a qualified professional will be conducting the installation of Atkar's Products at all times. Atkar will not be liable for any claim, notice, demand, action, damage (including to equipment or property), loss (including economic loss), cost, expense, personal injury or any other liability howsoever arising, whether present, unascertained, immediate, future or contingent, whether based in contract or tort or statute and whether involving any Third Party, in the event that the Customer has not complied with this clause or where the Customer has disregarded any advice which has been provided by Atkar.
- (e) Fire group ratings are for the Product itself and not applicable to the finished installation of the Products. Products must be installed as per Atkar guidelines in order to maintain ratings. Fire group ratings of Products have been conducted in controlled environments. Any variations to those conditions or environment may result in variations to the actual performance of the fire group ratings of the Products. As such, Atkar is unable to guarantee that the Product will adhere to such fire group ratings when used in your particular conditions.
- (f) Acoustic ratings of Products have been conducted in a laboratory to illustrate the improvement of incident noise. Please note that any variations to the conditions or environment (such as room geometry and other finishes) will result in variations to the actual acoustic performance of the Products. As such, Atkar is unable to guarantee that the Product will achieve such acoustic ratings when used in your particular conditions.

8. Cancellations and Returns: The Customer agrees that:

- (a) the Customer shall at no time cancel the whole or part of any order placed without Atkar's prior written approval;
- (b) the Customer shall not return Products without Atkar's prior written approval and only if the Products are in brand new and unused condition with undamaged packaging and if three weeks or more have not passed since the delivery date of the Products;
- (c) Atkar may otherwise elect to take back Products in saleable condition on such terms as it considers to be reasonable;
- (d) the Customer shall in any case pay to Atkar a restocking fee of 15% of the gross invoice value of all returns;
- (e) notwithstanding other provisions of these Terms the Customer shall not return Products without first providing an original invoice as proof of purchase; and
- (f) notwithstanding any other provisions of these Terms the Customer shall not return any Products which have been custom made, custom cut, custom processed or custom acquired.

9. Orders: The Customer agrees that:

- (a) each order it places shall be deemed to include a representation that it is solvent and able to pay all of its debts as and when they fall due; and
- (b) when any order is placed the Customer shall inform Atkar of any facts which may reasonably affect any decision to accept the order and/or grant credit and that any failure to do so shall be deemed to create and constitute an inequality of bargaining position, the taking of an unfair advantage of Atkar and to be unconscionable, misleading and deceptive.

10. **Minimum Invoice Policy and Purchase Price:** The Customer agrees that:
 - (a) the Customer shall at all times and in all respects comply with any minimum invoice policy as may at any time and from time to time apply on such terms as Atkar considers to be reasonable; and
 - (b) all sales are otherwise made by Atkar at its ruling price at the time of delivery and on such other terms as it considers reasonable.
11. **Delivery:**
 - (a) Atkar accepts no responsibility or duty to deliver but may elect to arrange delivery at its discretion and without liability and at the Customer's costs and risk in all things;
 - (b) Atkar shall not be liable for delay, failure or inability to deliver;
 - (c) Products shall be deemed to be delivered as soon as they are ready for delivery at which time risk will be deemed to pass to the Customer; and
 - (d) Atkar may charge for frustrated delivery to cover its reasonable expenses.
12. **Other Terms and Conditions:** No terms and conditions sought to be imposed by the Customer upon Atkar shall apply.
13. **Recovery Costs:** The Customer shall pay all costs and expenses including mercantile agent commissions incurred by Atkar and/or its agents in respect of its dealings with the Customer whether relating to any debt, possession of Products and/or otherwise.
14. **Forward Orders:** The Customer agrees:
 - (a) to pay for so much of any forward order as is from time to time incurred or invoiced by Atkar;
 - (b) that no delay or failure to fulfil any part of such order shall entitle any cancellation or variation of any order or delay or reduce any payment; and
 - (c) to pay any demurrage and/or other costs and expenses of Atkar in handling and/or holding Products once ready for delivery.
15. **Attornment:** For the purpose of giving effect to the Customer's obligations under these Terms (in particular clause 4 of these Terms) the Customer hereby irrevocably appoints the Credit Manager (or like equivalent) for the time being of Atkar as the Customer's attorney to sign all documents and do all things necessary to give effect to these Terms and Conditions of Trade.
16. **Disputes:** The Customer agrees to pay into Atkar's solicitors trust account any amount claimed by Atkar as a condition precedent to any dispute by the Customer of any such claim on the basis that upon resolution of the dispute the funds shall be dispersed according to the resolution. This clause shall operate as a bar to any defence or claim by the Customer until fully complied with.
17. **Severability:** Any part of these Terms being a whole or part of a clause shall be capable of severance without affecting any other part of these Terms.
18. **Goods and Services Tax (GST):** The Customer agrees to pay prices adjusted in accordance with ACCC Guidelines to take into account GST.
19. **Payment claims:** These Terms and Conditions of Trade may constitute a claim for payment under the *Building and Construction Industry Security for Payment Act 2002 (Vic)* and/or the equivalent legislation in any other Australian jurisdiction (as applicable).
20. **Interpretation:** In these Terms and Conditions of Trade, unless the context requires otherwise:
 - (a) **"Customer"** means the customer named in the Application for Credit to which these Terms and Conditions of Trade are annexed;
 - (b) **"Products"** means all products supplied by Atkar to the Customer;
21. **Credit Limits**
 - (a) Any credit limit is solely for the benefit of Atkar.
 - (b) The obligations of the Customer remain unchanged if the credit limit is exceeded or not specified at all
22. **Proper Law**

The Customer agrees that this Agreement and any claim and/or dispute between the Supplier and the Customer shall be governed by the laws of the State of Victoria and we agree to submit to the jurisdiction of the appropriate Court nominated by you in that State.